No.

IN THE SUPREME COURT OF APPEALS
OF
WEST VIRGINIA

KENNETH SAUNDERS CARTER — **PETITIONER**

v.

CIVIL ACTION NO. 05-MISC-327

CHRISTINA M. KARAWAN, on behalf of BLAKE ANDREW CARTER, a minor — **RESPONDENT**

From the Circuit Court of Kanawha County, West Virginia
Honorable Paul Zakaib Jr.

PETITION FOR APPEAL

John A. Proctor, (WVSB #7778)
Underwood Law Offices, Inc.
910 Fourth Avenue, Suite 1111
Huntington, WV 25701
Telephone: (304) 522-0508

Counsel for Petitioner
Kenneth Saunders Carter

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

TABLE OF AUTHORITIES (CONT'D)

Cases **Page**

Statutes

KIND OF PROCEEDING AND NATURE OF THE RULING IN THE CIRCUIT COURT

The Respondent, Christina Marie Karawan, as the mother of Blake Andrew Carter, a minor, filed a petition for change of name in the Kanawha County Circuit Court. She sought to change the child's name to Blake Andrew Karawan.

The child's biological father, Petitioner Kenneth Saunders Carter, who was married to Blake's mother when Blake was born, appeared and opposed the petition. The Circuit Court, The Honorable Paul Zakaib Jr. presiding, conducted a hearing on August 23, 2005. On August 26, 2005, the court ordered the name change as requested by Mrs. Karawan, but declined to terminate Mr. Carter's parental rights or to relieve him of his obligation to support the child.

STATEMENT OF THE FACTS OF THE CASE

The Petitioner, Kenneth Saunders Carter ("Mr. Carter"), and the Respondent, Christina Marie Karawan ("Mrs. Karawan"), were divorced on October 25, 1991, when their son, Blake Andrew Carter ("Blake"), was approximately one year old. (Final Order p. 2.) Mrs. Karawan was awarded custody of the child. (Tr. at 5.)[1] The divorce decree provided that Mr. Carter would pay child support of $134.15 per month. (Final Order p. 2.) In fact, Mr. Carter has paid $150 per month over the years, having missed making payment for only one brief period. (Final Order p. 3; Tr. at 7, 16.)

[1]The transcript of the hearing on August 23, 2005 is cited herein as "Tr."

Although Mr. Carter neglected to keep Mrs. Karawan apprised of his salary history, she never made any attempt to seek judicial modification of the amount of child support. (Tr. at 11.) Mr. Carter visited Blake on his first birthday and visited several times thereafter, with the last visit occurring around December of 1991. (Tr. at 6.)[2] Mr. Carter sent Blake a birthday card in October of 1993. (Tr. at 22.) Mrs. Karawan recalled taking Blake to Mr. Carter's home only one time. (Tr. at 6.) When Mr. Carter's mother died, Blake was named as Mr. Carter's son in the obituary. (Tr. at 17.)

Although Blake's legal name was Blake Andrew Carter, Mrs. Karawan has called him Blake Karawan ever since Blake was two years old. (Tr. at 26.) She enrolled him as Blake Karawan when he entered preschool. (Tr. at 11.) Mrs. Karawan's present husband is Henry Karawan. Mr. Karawan has never initiated court proceedings to adopt Blake. (Tr. at 9, 18.) When the trial court interviewed Blake in chambers, Blake indicated two reasons for wanting his name changed: (1) "I've always gone by Karawan," and (2) "I see him [Mr. Karawan] as my real father . . . because of the way he raised me." (Tr. at 29.)

Mr. Carter explained why he opposed the name change:

> As you get older, life gets a little more precious to you. And you know, I'm 42, and I don't have any other children. He's my only son. And I just, he's a part of me even if I haven't been around...

* * *

[2]Blake was born on October 29, 1990 (Final Order p. 2), and the last visit took place when Blake was about 14 months old. (Tr. at 6.)

I hoped that if his name was Carter he would get curious when he started to hit his teenage years and want to, at least, talk to me or see me or something like that. That's been my hope.

(Tr. at 16, 24.)

Mr. Carter made an effort to avoid conflict between himself and Mrs. Karawan in the presence of Blake. (Tr. at 21.) However, Mr. Carter testified that his reason for keeping a distance from Blake was because of the hostility that prevailed between himself and Mrs. Karawan, and his desire to avoid bringing Blake into this conflict. Mr. Carter testified as follows:

> We don't get along. We fight to this day, bicker, fight. And my visitation was, like, the first third Sunday of the month from noon to 6:00 either at her house or her mother's house. And I went several times and then started to bond with Blake.
>
> And then she suddenly was busy on the days that was my visitation. At that time, I was working six days a week in a restaurant, Monday through Saturdays. And Sundays was the only day I had. And that happened several times in a row, and I threw my hands up in frustration. And I quit going. And I wished I hadn't of made that mistake, but I did.
>
> And then when they petitioned me for the change of Blake's name when he started 1st grade, I had spoken with Chris, and I tried to speak. And, of course, we started fighting. I spoke with Mr. Karawan, and he seemed pretty reasonable. We had a conversation. And at that time, I had mentioned to you about, maybe, coming up and visiting. And Mr. Karawan made a very good point that would be disruptive. Maybe, it should be more, maybe if Blake wants to come to me sometime. So, we agreed at that time that maybe that was the best strategy. . . .
>
> I was a product of divorce, Your Honor, and my father used to say bad stuff about my mom. And I just wasn't going to do that to Blake. I was not going to make waves in his life. I don't want to be disruptive. But he [is] my only son. I don't have any other children.
>
> Q Did you, so you still consider Blake to be your son?

A Yes.

(Tr. at 14-16.)

Mr. Carter further testified as follows:

> I certainly brought up the issue of visitation on the name change when he started to 1st grade. We agreed in the welfare of the child that, maybe, I shouldn't interfere at that young age. That would be confusing. I used to work on adolescent psych. And I understand all about stability.
>
> I had scheduled visitations, and she quit being available on those days. She had other plans. I lived in Huntington, she at Charleston. I'd call her, and she said, oh, we have plans. You don't mind, do you? I didn't have another opportunity to get up.
>
> But again, I got frustrated with that, and I needed to get away.. . . .
>
> I discussed with them that I was trying not to make waves, but I was still waiting for that opportunity. I hoped that if his name was Carter he would get curious when he started to his teenage years and want to, at least, talk to me or see me or something like that. That's been my hope.
>
> I've tried not to make waves. I paid my support. I've just stayed in the background. I've always been a letter away. I've always responded whenever a call or letter came in there, I mean. So, anytime I've been contacted, I've returned, but I just wasn't going to fight any more.

(Tr. at 23-25.)

When the trial court indicated that a name change would be granted, Mr. Carter's counsel argued that it would be inconsistent to change Blake's name while at the same time not terminating Mr. Carter's parental rights and not relieving him of his obligation to pay child support. (Tr. at 37.) In the final order of August 26, 2005, the trial court did not terminate parental rights or child support obligations, but did order that Blake's name be changed to Blake Andrew Karawan.

Although the record reflected that Mr. Carter sent a birthday card to Blake in 1993 (Tr. at 22), the trial court found that Mr. Carter "has never sent his son a birthday card," and has not contacted his son for more than 13½ years. (Final Order p. 3.) Despite the absence of evidence to contradict Mr. Carter's testimony that Mrs. Karawan repeatedly thwarted his attempts to visit or contact Blake, the trial court's final order stated:

> Other than paying court-ordered child support, he has not performed any act evincing an interest in, or love for, his child, or any other conduct consistent with the acts and conduct of a father who has interest in his child, *notwithstanding the fact he has not been prevented in any way from doing so for approximately 13½ years*[.]

(Final Order p. 3 (emphasis added).)

Although the trial court expressly stated at the hearing that "I cannot say that there is an abandonment per se" (Tr. at 35), the court stated in the final order that "clear, cogent and convincing proof exists in the record to establish that Kenneth Saunders Carter has had a settled purpose to forego all parental duties and relinquish all parental responsibilities and claims to his child." (Final order p. 5.)

ASSIGNMENT OF ERROR

Petitioner submits that the trial court abused its discretion in ordering a change of name for Blake Carter. The trial court ruled that such change would be in the child's best interests.

DISCUSSION OF LAW

THE TRIAL COURT ABUSED ITS DISCRETION BY ORDERING A NAME CHANGE

The law in West Virginia is quite clear that, in deciding whether the best interests of a child will be served by a name change, the evidence supporting a change must be "far stronger with regard to benefits to the child" unless the father "has abandoned all parental rights and responsibilities." *In re Harris*, 160 W. Va. 422, 426, 236 S.E.2d 426, 429 (1977). "[A]bsent extreme circumstances a father who exercises his parental rights has a protectable interest in his children bearing his surname and this interest is one quid pro quo of his reciprocal obligation of support and maintenance." 160 W. Va. at 427, 236 S.E.2d at 429; *see also West v. Wright*, 283 A.2d 401, 402 (Md. 1971) ("[C]ourts are also most reluctant to allow such a change except under extreme circumstances"); *In re Maliszewski*, 615 N.Y.S.2d 977, 978 (Rockland County Sup. Ct. 1994) ("[I]t is not the policy of the courts to grant these applications unless there is a compelling reason to do so").

Although it is not a property right, a "father's interest in having his children bear his name is a valuable and protectable interest." *In re Harris*, 160 W. Va. at 426, 236 S.E.2d at 429. As the *Harris* case established, there is a distinction between fathers who have completely abandoned all parental responsibility for a child and fathers who have not completely abandoned a child. When there is no proof of a complete abandonment of all parental responsibility, a name change is not in a child's best interests absent extreme circumstances. Moreover, "there is a presumption that change is detrimental and must be justified." *Lufft v. Lufft*, 188 W. Va. 339, 343, 424 S.E.2d 266, 270 (1992) (citing *State ex rel.*

Spence-Chapin Services to Families & Children v. Tedeno, 421 N.Y.S.2d 297 (New York County Sup. Ct. 1979)).

The *Harris* court posited two examples of the kind of extreme circumstances that would justify a name change, describing a notorious criminal and a father who provides "no support and maintenance":

> We can envisage a case, for example, in which the father of a child were such a notorious criminal, notwithstanding the fact that he may be a good father, that the child's bearing a common surname with him would create such a stigma or embarrassment that the child's mental health would be jeopardized or his or her opportunities in life narrowly circumscribed. We do not feel, however, that mere convenience or dislike on the part of the guardian or child of his surname is sufficient reason for a change where a father has exercised his rights.
>
> Where a father abandons his children, provides no support and maintenance, does not visit the children, and does not in any other reasonable way, given his position in life and the opportunities for the exercise of his parental rights, exercise the authority or undertake the responsibilities of a parent, there is no reason why a mother or other guardian should not be able to change the name of the child, upon proper notice to the father. Under these circumstances the child would then have the advantages of a common name with his or her parent or guardian, and many of the advantages which we have outlined above which by tradition pass through the male line, in default of such opportunity for passage, would pass through the female line. Furthermore, we would not be concerned with the father's protectable interest because he would have waived such interest by abandonment.

160 W. Va. at 428, 236 S.E.2d at 429-30.

In a concurring opinion, Justice Harshbarger noted that "a trial court's discretion to proscribe a legal name change should be construed narrowly." 160 W. Va. at 430, 236 S.E.2d at 430 (Harshbarger, J., concurring). Other courts have echoed the *Harris* court's reasoning that a mere dislike of a father's name is not a sufficient reason to change it. For

example, in reversing a trial court's order that several children's names be changed from that of their biological father to that of their stepfather, the Kentucky Supreme Court stated:

> [W]e disagree with District Court that the best interest of the child is reduced to a simple question of the child's wishes in the matter, regardless of how strongly expressed, and regardless of claims of inconvenience attaching to the use of the divorced father's name. Clearly the father has a right and a protectable interest in having his children bear his name which is not forfeited on insubstantial grounds. The best interest of the child as well as that of the father is involved in maintaining the relationship with the divorced father fostered by bearing his name, unless, of course, there are substantial reasons to the contrary, and these reasons do not include mere inconvenience and the desires of a child generating from the hostility of a custodial parent.

Likins v. Logsdon, 793 S.W.2d 118, 122 (Ky. 1990).

Similarly, in *Bennett v. Northcutt*, 544 S.W.2d 703 (Tex. Civ. App. 1976), the court upheld a trial court's refusal to allow a name change, stating:

> Burt Northcutt could not be expected to present evidence to the effect that the change would impair his love for his daughter or that it would weaken his sense of obligation to take care of her. We hold that he had no such burden. The burden, rather was on the applicant to establish that the change would be for the best interest of the child . . . .
>
> The evidence in the present case, one-sided though it is, establishes only that the child herself has a strong preference for the change of name and will experience emotional distress if her preference is denied. No other evidence was presented indicating that the change would be of any greater advantage to her than to any other child whose mother has divorced and remarried. The question then comes to whether the trial court acted arbitrarily or unreasonably in failing to give controlling weight to her preference and to her probable reactions on being denied that preference. We conclude that no arbitrary or unreasonable action is shown.

Id. at 708; *see also In re Newcomb*, 472 N.E.2d 1142, 1145 (Ohio Ct. App. 1984) ("[M]ore than a mere desire on the part of an upset child . . . is necessary").

As this Court recognized in the *Harris* case, there are sound policy reasons that justify retaining a father's surname for his child:

> Long-standing social convention has made the surname of a child the same as that of the father. *See* D.L. Fuller "Domestic Relations the Right of a Married Woman to Retain Her Maiden Name," 79 W. Va. L. Rev. 108 (1977). There are many practical considerations which even today militate in favor of this tradition. For example, a surname common to both parent and child makes it easier to demonstrate a legal relationship for the purpose of qualifying for benefits with the Social Security Administration upon the death of the father, as an heir in the event of intestate succession, or as the beneficiary of certain types of group insurance policies such as "G.I. Insurance" where the beneficiaries are established by law unless specifically changed by the insured.
>
> In addition, in areas where families live in a given county for successive generations, a family name may be a substantial financial asset. A well-regarded and trusted member of a community may pass on to his children a certain presumption with regard to honor, integrity and fair dealing based upon the conduct of the parents. Regardless of the relationship between the parents, this can be a valuable asset to the children. It may give the children a substantial edge in life when they seek credit, employment, or admission to tightly controlled union, trade, or professional groups.

160 W. Va. at 426-27, 236 S.E.2d at 429.

An even more significant reason for retaining a father's surname is to foster a relationship between a child and his non-custodial father. This concern is particularly at issue in the present case given Mr. Carter's testimony that he hoped Blake would retain the Carter surname in order to foster a bond between the two. (Tr. at 16, 24.) "[T]he custodial parent and the children, having regular contact and the primary home, have a greater opportunity to maintain their psychological relationship without having to rely on the symbol of a name, and this fact may weigh heavily in support of retaining the non-custodial parent's

surname." *In re Wilson*, 648 A.2d 648, 651 (Vt. 1994). In the *Likins* case, the Kentucky Supreme Court observed:

> "No one can seriously argue that changing a child's name from that of his natural father to that of his step-father could not weaken the emotional bond between the child and his father, or that such a change would necessarily be in the child's best interest. Further, it is recognized that a natural father has a protectable right to have his child bear his name, 57 Am. Jur. 2d *Name* § 14 (1971). . . ."

793 S.W.2d at 121 (citing *Burke v. Hammonds*, 586 S.W.2d 307, 309 (Ky. Ct. App. (1979)); *see also In re Willoughby*, 2004 WL 877734, at *2 (Ohio Ct. App. Apr. 23, 2004) (trial court properly denied application for name change because "a name change would destroy an already strained relationship between the children and their father," even though the children were mature and wanted their surname changed).

In *re Marriage of Omelson*, 445 N.E.2d 951 (Ill. App. Ct. 1983), the court reversed a trial court's order changing a child's surname from that of her biological father to that of the mother's new husband. Explaining its reasoning, the court stated:

> Although the interests of mother and child will frequently coincide, they can frequently diverge. It is a generally accepted rule that there should be no conflicting interests between the infant and the party representing him. (*Clarke v. Chicago Title & Trust Co.* (1946), 393 Ill. 419, 66 N.E.2d 378; *Millage v. Noble* (1929), 334 Ill. 315, 166 N.E. 50.) The situation could present a conflict of interest and care must be taken, especially where the minor is of tender years, to assure that some purpose of the custodial parent does not taint the determination of the child's best interest. For instance, the mother may be prompted to petition for a name change in order to punish the ex-husband and father, to prove her enduring devotion to her new husband, to show her new husband that all ties to her former marriage are broken, to present to the community a facade of a unitary family, or to hide the fact that the mother had previously been through a divorce. . . .

. . . [I]n *Mark v. Kahn*, 333 Mass. 517, 131 N.E.2d 758, 53 A.L.R.2d 908 (Sup. Jud. Ct.1956), the court expressed the view that

> The bond between a father and his children in circumstances like the present is tenuous at best and if their name is changed that bond may be weakened if not destroyed. * * * A change of name may not be in the child's best interest [if] the effect of such change is to contribute to the further estrangement of the child from a father who exhibits a desire to preserve the parental relationship. [131 N.E.2d at 762.]

And in *Robinson v. Hansel*, [302] Minn. [34], 223 N.W.2d 138 (Sup. Ct. 1974), the same considerations were stated in the following language:

> * * * courts have traditionally tried to maintain and to encourage continuing parental relationships. The link between a father and child in circumstances such as these is uncertain at best, and a change of name could further weaken, if not sever, such a bond.

Id. at 955-56; *see also In re Change of Name of Barker*, 802 N.E.2d 1138, 1140 (Ohio Ct. App. 2003) (changing children's surname "would further disassociate them from their father").

In ***Error! Bookmark not defined.****re Name Change of Steven Robert Richey*, 1 Pa. D. & C.4th 435, 1988 WL 188452 (C.P. 1988), the non-custodial father sometimes failed to pay child support, and had not seen his sons (ages 11 and 13) for almost five years. Each son wanted to change his surname from that of the father to that of their mother's paramour, with whom they lived. Denying the request for a name change, the *Richey* court explained:

> A basic and sound reason for declining approval of the proposed change of surname is that it will serve to drive an additional wedge between Steven and Craig and their natural father and to further dissipate a root or blood heritage. *See Rounick's Petition*, 47 Pa. D. & C. 71 (1942). We recognize that respondent has not seen the boys for years and that he has not contacted or communicated with them since 1983, but may this not be in part attributable to a feeling of discouragement over the distance between them and the fact that

> their mother as the custodial parent controls their relationship with him? After the problem over his exercise of temporary custody in 1983 she had decided "there would have to be something done about [him] taking them again . . . we'd have to work something different out. They'd [the boys] have to stay around Pennsylvania." It is obvious that petitioner has never suggested that either Steven or Craig initiate a contact with their father, despite her knowledge of his constant residential address. That the blood association is important to respondent is evident and emphasized by the fact that his firstborn carried not only the paternal surname but also the same first or given name as his father.
>
> . . . .
>
> The foregoing reason standing alone the potential of a name change as an instrument of alienation and disassociation from an objecting non-custodial parent, may be insufficient ground to deny the request and lack force when asserted by a parent shown previously to have abandoned or forsaken the children, but such is certainly not the case here. For a substantial period of time, indeed during the major portion of the parties' separation, respondent has been paying child support (*see Dibacco Petition*, 32 Pa. D. & C.2d 90 (1963)); moreover his past actions and the current contest are manifestations of continuing hope for a meaningful personal relationship with the boys eventually, which a practical alteration of identity through surname change could well atrophy. We do not wish to deprive him of another link in the chain which may stave off estrangement from his sons.

1 Pa. D. & C.4th at 438-39, 441; *see also Plass v. Leithold*, 381 S.W.2d 580, 582 (Tex. Civ. App. 1964) (court denies name change, noting that adoptive father's presence at hearing, in person and with an attorney, is evidence that he was still quite interested in his adopted son and desired to preserve parental relationship, though adoptive mother had remarried after divorcing the adoptive father).

In the present case, Mr. Carter has continued to pay child support for Blake and desires a relationship with his son. The only concrete evidence suggesting that a name change would be in Blake's best interests is Blake's own preference and the fact that there has

been minimal contact to date between Mr. Carter and Blake. There is absolutely no evidence that Mr. Carter has ever said anything to suggest that he does not love Blake or does not want a relationship with his son.

In the *Harris* case, this Court signaled that, absent extreme circumstances, "in no event shall proof of abandonment for name change purposes be less than that required to divest a parent's rights under the adoption statute." 160 W. Va. at 429, 236 S.E.2d at 430. Under W. Va. Code § 48-22-306, there is no presumption of abandonment unless, among other things, a father fails to financially support his child. Abandonment is "any *conduct* . . . that demonstrates a settled purpose to forego *all duties* and relinquish all parental claims." W. Va. Code § 48-22-102 (emphasis added). While Mr. Carter may have failed to keep in contact with Blake over a long period of time, such an omission is not affirmative *conduct*. More importantly, Mr. Carter clearly has not abandoned *all duties* of a father because he has regularly paid child support.

Simply put, Mr. Carter has not abandoned Blake under the standard that is set forth in the *Harris* case. The trial court's final order was, therefore, an abuse of discretion.

A father who sends no mail and makes no telephone calls to his children has not abandoned them. *In re Adoption of William Albert B.*, 216 W. Va. 425, 607 S.E.2d 531, 534 (2004). The fact that a father may have "many weaknesses" and is by no means a "perfect" father does not establish abandonment. 607 S.E.2d at 536. *See generally in re Adoption of Mullins*, 187 W. Va. 772, 421 S.E.2d 680 (1992) (although natural father provided almost no support for his child and did not visit her for almost four years, maternal grandparents

seeking to adopt child without father's consent failed to prove by clear cogent and convincing evidence that father intended to abandon his daughter, in view of evidence that grandparents discouraged father's relationship with mother and the child, discouraged father from undertaking his parental responsibilities, and undermined his attempts to develop a relationship with his daughter. *In re Adoption of Schoffstall*, 179 W. Va. 350, 368 S.E.2d 720 (1988) (failure to pay child support does not alone constitute abandonment of natural parents' rights for purposes of adoption proceeding). The fact that a father provides financial support for his child establishes that he has not abandoned the child under West Virginia law, even if he fails to maintain contact with the child in other respects.

In a Pennsylvania case having some parallels with the present case, the court denied a name change request on behalf of a 12 year-old boy, even though his father had not seen him for 10 years. The court reasoned as follows:

> In the present case, the testimony establishes that the father, Donald Keith Stoves, Sr., has lived up to his responsibility of supporting his son. He has remained current at all times in his support payments. Mr. Stoves' conscientious payment of support for his son is some evidence that he is not totally "indifferent" toward his son, as counsel for petitioner suggests.
>
> Mr. Stoves lack of contact with his son for ten years, while practically backyard neighbors, is somewhat puzzling to this court. This court can initially understand that Mr. Stoves honored his wife's request to stay away from her new marriage and/or not force himself where he was not wanted. It is perplexing why a father waits ten years to attempt to begin a relationship with his son, but it is a request that is difficult to deny or hamper.
>
> I see nothing to help the welfare of the child by granting this petition. I am convinced, at this time, that if I would grant it, this court would be lending aid to the estrangement of father and son. To decree a name change would simply be another slip (or the final blow) of a complete severance of the father-child relationship.

> All Mr. Stoves is asking the court at this time is to defer for the time being the severance of his only real link to his son at present the chance to get to know his son and teach him about the name he has borne for 12 years.

In re Petition of Stoves, 35 Pa. D. & C.3d 40, 44-46, 1985 WL 5380 (C.P. 1985).

It must be remembered that a major reason for Mr. Carter's lack of past contact with Blake was his difficulty in maintaining a civil, cooperative relationship with Mrs. Karawan. Mr. Carter believed that contact with Blake would have been counterproductive under these circumstances. It is reasonable to infer that he believed Mrs. Karawan might prevent Blake from receiving telephone calls or letters. Mrs. Karawan admitted that she recalled taking Blake to see Mr. Carter only once. (Tr. at 6.)

In *re State ex rel. Kelley*, 90 P.3d 566 (Okla. Ct. App. 2003), an Oklahoma court reversed a trial court's order that several children's surname be changed from that of their biological father to that of their mother's new husband. The biological father had been paying child support and had given other financial support but had "otherwise not significantly participated in the lives of Children for the last six years." *Id.* at 567. Explaining the decision, the *Kelley* court stated:

> [T]he trial court erred in ordering the name change. In this connection, we find Father's argument that his surname, which is his birthright to his children, is perhaps the last tangible link to his family. This link should not be severed as a convenience to Children or to Wife. It should only be severed under the most compelling circumstances, which are not present here.
>
> Father testified that since her remarriage, Mother engaged in a practice and pattern of interfering with Father's attempts to maintain a parental bond with Children. This was done, according to Father, through actions such as not returning phone calls, scheduling social engagements in conflict with Father's visitation schedule, and prohibiting Children's visits with the paternal

> grandparents. Father decided not to exacerbate the tense situation between him and Mother or jeopardize his already tenuous bond with Children, so he elected not to exercise any significant visitation until Children were older. Father testified he planned to reestablish contact with Children when they were older and he would not have to contend with Mother's interference. Further, Father's faithful payment of child support can be construed as evidence of his desire to maintain a parental relationship, as do his refusals to consent to the name change or adoption, even though to do so would be of financial benefit to him. These factors, taken as a whole, support Father's argument that he is trying to do what is best for his children in difficult circumstances. To sever the last remaining familial link between him and Children simply for their convenience is not in their best interest.
>
> We are not unmindful that Children have elected to be known by a different name than Father's. However, that is a choice of convenience for them, and their legal surname remains that of Father, their choices notwithstanding. Upon reaching legal age, Children have options available to them, when neither parent is in a position to object.

Id. at 571.

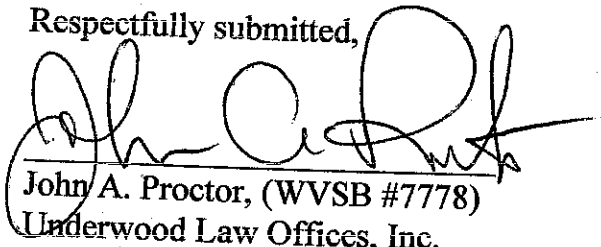
As the *Kelley* court intimated, it was in the children's best interest to wait until they were adults to make a decision about their surname. *See also Marshall v. Marshall*, 93 So. 2d 822, 827 (Miss. 1957) (reversing trial court's grant of name change, court notes that child can change his name when he attains age of majority). Blake will become an adult in less than three years, on October 29, 2008, at which time he may decide what surname would be in his best interests.

In the present case, the trial court abused its discretion in ordering a name change in the absence of proof that Mr. Carter had abandoned Blake. The trial court's order was contrary to this Court's decision in the *Harris* case and was contrary to sound policy concerns.

RELIEF PRAYED FOR

Petitioner asks this Court to reverse the trial court's final order and to reinstate the child's original name, Blake Andrew Carter.

Respectfully submitted,



John A. Proctor, (WVSB #7778)
Underwood Law Offices, Inc.
910 Fourth Avenue, Suite 1111
Huntington, WV 25701
Telephone: (304) 522-0508

Counsel for Petitioner
Kenneth Saunders Carter

FILED

2005 DEC 23 PM 3:44

CATHY S. GATSON, CLERK
KANAWHA CO. CIRCUIT COURT

VERIFICATION

I, John A. Proctor, after making an oath of affirmation to tell the truth, say that the facts I have stated in this **Petition for Appeal** are true of my personal knowledge; and I have set forth certain matters stated to be upon information given to me by others, I believe that information to be true.

John A. Proctor, Counsel for Petitioner
KENNETH SAUNDERS CARTER
910 Fourth Avenue, Suite 1111
Huntington, WV 25701
Telephone: (304) 522-0508
Facsimile: (304) 399-5449

December 16, 2005
DATE

This Verification was sworn to or affirmed before me on the 16th day of December, 2005.

NOTARY PUBLIC

My Commission Expires: November 19, 2011

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
ANGELA D. BOSTER
UNDERWOOD LAW OFFICE
910 FOURTH AVE., STE. 1111
HUNTINGTON, WV 25701
My commission expires November 19, 2011

FILED

2005 DEC 23 PM 3:44

CATHY S. GATSON, CLERK
HANCOCK CO. CIRCUIT COURT

CERTIFICATE OF SERVICE

I, John A. Proctor, certify that I served a true and exact copy of the foregoing **Petition for Appeal** by depositing the same in the regular manner in the United States Mail, postage prepaid at Huntington, West Virginia, December 16, 2005.

Christina Marie Karawan
1008 Lynn Oaks Drive
Cross Lanes, WV 25313

UNDERWOOD LAW OFFICES

By: _____

John A. Proctor (WVSB #7778)
Counsel for Petitioner
KENNETH SAUNDERS CARTER
910 Fourth Avenue, Suite 1111
Huntington, WV 25701
Telephone: (304) 522-0508
Facsimile: (304) 399-5449